SUBJECT INDEX.

CASES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 367.

R. E. KENNINGTON ET AL

v.

A. MITCHELL PALMER ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, JACKSON DIVISION, SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF FOR APPELLANTS.

Supplemental Statement of Facts.

Complainants and appellants (hereinafter called appellants), R. E. Kennington, Union Department Store, and R. E. Kennington Company. Defendants and appellees (hereinafter called appellees), A. Mitchell Palmer, Attorney General of the United States; H. E. Figg, United States Fair Price Commissioner; T. J. Locke, Fair Price Commissioner for Mississippi; S. J. Taylor, Fair Price Commissioner for

Jackson; Julian Alexander, United States attorney for the Jackson Division; H. M. Fulgham, assistant therein.

Certain questions are covered by associate counsel. To present the questions discussed, this supplemental statement is made.

The cause comes by direct appeal, upon constitutional grounds, from decree dismissing appellants' bill.

The Original Bill.—The parties litigant are as stated. Federal jurisdiction was predicated upon a controversy involving the requisite amount, and rights and privileges arising under:

(*a*) Divers provisions of the Federal Constitution (*inter alia*):

(1) Article I, section 1, vesting in Congress legislative power;

(2) Article I, section 8, subdivision 11, vesting therein war power;

(3) Article III, section 2, subdivision 1, defining Federal judicial authority;

(4) Article IV, section 4, requiring a republican form of government to be guaranteed;

(5) Article VI, section 2, making the Constitution and statutes enacted in pursuance thereof the supreme law of the land;

(6) The Fourth Amendment, guaranteeing safety and security in property and papers against unreasonable searches and seizures;

(7) The Fifth Amendment, wherein—

(*a*) Liberty and property are not to be taken without due process of law;

(*b*) Nor private property taken for public use without just compensation;

(8) Amendment VI;

(9) Amendment IX and Amendment X;

(*b*) The act of Congress to provide for the national se-

curity and defense, passed August 10, 1917; the amendments thereto of October 22, 1919, extending its provisions, hereinafter called "Lever Law;"

(c) Divers proclamations under assumed powers thereunder alleged to be derived, and especially the pronunciamento of the Mississippi Fair Price Commissioner, in these words:

> "Fair price committees are advised that the Commissioner for Mississippi has this thirtieth day of April fixed and does hereby promulgate the following maximum prices and maximum margins of profits which a retail merchant handling the following named articles of merchandise may charge, and these prices and margins of profit are based on actual, original cost, plus freight or express, and war tax, and they are maximum; merchants may sell for less." (Here follow prices listed, R., p. 10.)

Appellants for many years operated high-grade department stores (Tr., 5), and have a large business, fairly remunerative, now threatened with destruction unless appellees are enjoined from continuing their unlawful activities (Tr., 6). By uniform fair treatment a valuable property in goodwill and going value is now owned (Tr., 6).

The enactment of the Lever Law is detailed (Tr., 8 and 9). Thereunder appellees, as to price fixation, instituted a system of espionage (Tr., 12) and sought to compel the production of all invoices, etc., and when appellants dared maintain their constitutional prerogatives, they were by appellees published as "profiteers."

Locke, who promulgated said pronunciamento, has no experience in operating a department store; is utterly ignorant of the elements integrated into the proper conduct thereof, and said Taylor, who participated therein, is substantially in the same category (Tr., 13).

There are many stores in active competition with appellants.

"* * * In each of the departments * * * wherein no change in the stock is requisite to co-ordinate it with the whims of fashion and to obviate other extraordinary conditions, complainants have always, are now, and will continue to ask, a profit less than that assumed to be established by respondents" (appellees). "In divers of their departments, more especially millinery and women's ready to wear, there are constantly changing modes, to comply wherewith" (Tr., 13) "involves the rendition of additional service by appellants, wherefor reasonable compensation must be made, as each of said departments should to them have allocated all expenses therein incurred. As to said departments there are published in New York, Paris, and elsewhere certain illustrated magazines purporting to give in advance the styles which publications circulate among appellants' patrons, and which are conflicting and confusing in the extreme. In order to render this service, appellants must buy in advance, utilizing their offices in New York, Paris, and other means hereinafter set out therefor. A rare ability, commanding a large salary, is required by those in position to anticipate the vogue at a future date, and to select those articles which, in addition to being a hat or a dress, will embody style, and to that end appellants are expending large sums in foreign markets, where such things are first displayed, diligently endeavoring to winnow out of the variegated conglomerations that which will possess style and which will at a future date appeal to feminine fancy.

"That between producers of this merchandise the output is not uniform, each several producer seeking for personal aggrandizement to individualize his output so as to make this individualism the vogue, and should any such individualism be ignored by appellants and thereafter become the vogue, the penalty would be the loss of the patronage of this class of buyers and the serious impairment of appellants' good will. In said business there is a great money risk in operating a style shop. In order to render this service, which is separate and apart from selling goods as goods, and which alone appellees have considered, it is essential that there be added to the usual out-of-

pocket cost the following, which appellees have wrongfully ignored:

"(*a*) Actual cost of going to, remaining at, and keeping in touch with the market and every part thereof.

"(*b*) Adequate high salaries commensurate with this class of ability.

"(*c*) Actual buying in advance of that which is hoped to be stylish and disposing thereof in due course.

"(*d*) Being luxuries and near luxuries, a forecasting of the ability of its purchasers to buy, predicated upon the condition in this section of the cotton crop.

"That appellants' businesses in these departments are with women, who have very definite opinions of that which is stylish, predicated upon the aforesaid publications and divers others, and should appellants procure in advance styles that would not be worn they would be absolutely unsalable, and that which the public demands of appellants is that they offer for sale that which is stylish when it is stylish; and that appellees have placed this service and the goods themselves upon the same selling basis as those goods which are sold to appellants over the counter, and appellants aver that wrongfully appellees have assumed to take jurisdiction over the complete field covered by that which is denominated 'wearing apparel,' embracing the furnishing of style, and have wrongfully assumed to place the business of appellants under their jurisdiction, and it is only by having what these followers of fashion are willing to buy when they want to buy it that appellants can stay in business. And that those desiring to buy a hat as a hat, or a dress as a dress, *sans* style, are able to get the same at a price less than the original cost of acquisition to appellants, while those who insist upon having a hat plus style, and a dress plus style, are willing to and must be willing to pay a sufficient amount to allow the dealer therein trafficking to earn a profit therefrom, and appellants aver that said appellees have no power to control the prices paid for the rendition of said service in furnishing style in said several departments; but, notwithstanding this, have wrongfully assumed juris-

diction thereover and are holding appellants up as profiteers to the public, when they are performing this service and charging therefor that which the public is willing to pay, and over which service said appellees are wholly without jurisdiction. Said goods so offered are not in anywise affected with a public use, and the acquisition of such commodities, plus the style, is merely the gratification of a feminine whim, and appellees are wholly without power, despite their acts to the contrary, to take from these appellants for the private gratification of the fancy of their customers their private property without just compensation for private use. An analysis of each of these sales shows that there is a sale by appellants of the actual goods made, and also in the sale the rendition of a service which, as a completed whole, is requisite in each of these departments, and the right thus to sell style, when disposing of the materials expressing it, is a property right wherein appellants have invested large amounts of money and which cannot from them be taken contrary to the Federal Constitution.

"Appellants further aver that they are entitled to indemnity against the loss irretrievably incident to such a business, and, in being a purveyor of style, must be allowed to dispose of those commodities that do not express it at a loss that must be allocated against the purchase price of the goods sold profitably; and that when thus conducted the business yields only a reasonable profit in some stores, and in others almost none" (R., 13, 14, 15).

"The replacement values of divers commodities owned by appellants is greater than the retail price whereat they are now being sold, notwithstanding. under such list, total income must be still further reduced.

"Appellants have the constitutional right to convert their property at a reasonable wholesale value plus a reasonable retail profit thereon" (Tr., 16). "Due to the possession of a stock of goods wherein there has been an uplift, a large amount of paper profits apparently have accrued to appellants, but this must be set aside as a reserve to absorb the loss which will inevitably occur due to the possession of a similar stock

of goods when the prices of such goods purchased at the present abnormal cost have again returned to their former levels; and appellants are entitled to retain this apparent paper profit as a reserve against said decline, and should the demands of appellees be complied with by a conversion at the prices fixed the result will be the destruction of appellants' businesses, and when the abnormal prices are restored that apparent uplift in values will be completely eliminated and appellants will be possessed of but the same stock of goods. Appellants are but taking from their businesses an amount equal to their normal profits as a distributor, leaving said paper profits apparently accruing to continue in the business to insure its solvency, which will be destroyed if appellants are not vouched the rights therein sought.

"That the United States Government, and said appellees, have no jurisdiction whatsoever over luxuries and near luxuries, wherein appellants deal; but notwithstanding said want of power, said appellees have wrongfully assumed jurisdiction over appellants' businesses with reference thereto, and will, unless restrained, continue so to exercise said trespasses, as hereinbefore set out, as to deprive appellants of their said constitutional rights.

"The exercise of such assumed authority by appellees is actual, arbitrary, and in violation of the Federal Constitution" (Tr., 17).

"Should all sales made by appellants be in accordance with the price fixation in all instances, appellants would do business at an actual loss" (Tr., 20-21).

"A detailed cost analysis is annexed as to R. E. Kennington Company, showing a net profit of 5.8 per cent on the entire turnover, Federal taxation alone consuming 5.6 per cent" (Tr., 30).

"Appellees have assumed to fix the profit on all staple and fancy dry goods, which are in no sense 'wearing apparel'" (Tr., 21).

"The prices fixed have no reference whatever to the basis of profit necessary to yield a reasonable return, are lower than in any other State in the American Union; entirely ignore reproduction value, and are

predicated solely upon original cost, disregarding all other elements" (Tr., 21).

"Appellees are wholly without power so to do, and the exercise of their assumed authority ignores losses directly attributable to variations in style, progressive unsalability, and other necessary elements, and is based upon the economic impossibility of 'making each separate and independent sale stand upon its own facts, without reference to the entire * * * business, or any line or department thereof" * * * (Tr., 22).

Appellees autocratically sought to injure appellants, holding them up as "profiteers," and directed their proceedings directly against appellants, because they were large merchants, and sought to coerce thereby the smaller merchants.

Appellees have inflicted irreparable damage upon appellants, are continuing the same, and seek to cause indictments for failure to correlate their prices to said list. The constitutional rights are averred, and their violation set forth at length; and relief in equity against their infringement is sought.

Upon the hearing for a preliminary injunction, the court, *sua sponte*, dismissed the bill, but granted a direct appeal.

POINTS.

I.

The district court was vested with power to dismiss, sua sponte, the bill after it had determined the legal remedy adequate.

II.

As a court of equity, the district court had jurisdiction, as—

(1) *The Lever Law was challenged as unconstitutional;*

(2) *The fixation of prices thereunder was challenged as in excess of Federal statutory authority by reason of—*

(*a*) *No jurisdiction over style;*

(*b*) *No jurisdiction over all of the commodities sought to be affected;*

(*c*) *The disregard of essential cost elements integrated in buying, holding, and distributing, essentially allocable to the several services.*

III.

Fixation of prices void, as—

(*a*) *Unauthorized;*

(*b*) *No judicial hearing vouchsafed whereunder reasonableness is determinable.*

IV.

The Lever Law unconstitutional and departmental enforcement illegal, because—

(*a*) *Violative of the Fifth Amendment, in—*

(1) *Taking private property for private use without due compensation;*

(2) *Depriving appellants of liberty and property without due process of law.*

(*b*) *Violative of the Sixth Amendment with reference to rights thereunder vouchsafed.*

(c) Unauthorized at present under Article I, section 8, subdivision 11, the war power, because—

(1) Not in a territory wherein war was flagrant;

(2) Limited as to property and liberty involved by the Fifth Amendment;

(3) The scope of the law, especially the departmental interpretation thereof, far broader than the Constitution allowed;

(4) The power now terminated;

(d) Article IV, section 4, whereunder each State must be guaranteed a republican form of government;

(e) Article VI, section 2, whereunder the Constitution and enactments in pursuance thereof are the supreme law of the land.

(f) Where under Amendment Nine and Amendment Ten there shall be no disparagement of the powers reserved to the people and the several States.

POINT I.

The District Court Was Vested with Power to Dismiss, sua sponte, the Bill After It Had Determined the Legal Remedy Adequate.

On the application for the preliminary injunction the district court was of opinion that an adequate remedy existed at law; and thereupon it, *sua sponte*, dismissed the bill without prejudice and without pleading filed by appellees.

The practice is amply sustained (*Hipp v. Babin*, 19 How., 278; *Parker v. Winnipiseogee*, 2 Black, 550; *Wright v. Ellison*, 11 Wallace, 16; *Lewis v. Cox*, 23 Wallace, 470; *Minnesota v. Northern Securities Co.*, 184 U. S., 235; *Garzot v. Rice*, 209 U. S., 297).

POINT II.

As a Court of Equity, the District Court Had Jurisdiction.

The Lever Law is challenged as unconstitutional; the fixation of prices in pursuance thereof is challenged as in excess of Federal statutory power.

Under these circumstances a court of equity will enjoin.

The right to test (*a*) the constitutionality of a statute and (*b*) the question of usurped authority thereunder, by enjoining the parties charged by law with the exercise of these powers, is settled beyond question (*Rhode Island v. Palmer*, No. 29, original; *State of New Jersey v. Palmer*, No. 30, original; *George C. Dempsey v. Bogatow, U. S. attorney; Kentucky Distilleries, etc., v. Geary, U. S. attorney; Figenspan, a corporation, v. Bodine, U. S. attorney; Sawyer, U. S. district attorney, v. Products Co.; Brewing Association v. Moore, collector*, decided June 7, 1920, — U. S., —; Adv. Shts.,* 613. *See, also, Green v. Frazier*, — U. S., —; Adv. Shts., 625; *Ft. Smith, etc., R. R. Co.*, — U. S., —; Adv. Shts., 630).

In *Hammer v. Dagenhart*, 247 U. S., 251, a bill was filed to enjoin the enforcement of a Federal statute, and the jurisdiction was sustained without question.

In *Wilson v. New*, 243 U. S., 331, a similar decision was made. *See, also, Ex parte Young*, 209 U. S., 159.

There can be no doubt of the power of a court of equity to enjoin appellees, although occupying official positions, from attempting to enforce an unconstitutional statute against the

*Advanced sheets Co-operative Publishing Co.

appellants in excess of their lawful authorities, causing to appellants threatened and resultant irreparable injury. See *Creamery Co. v. Kinnane,* 264 Fed., 851, citing, to follow, *Philadelphia Co. v. Stimson,* 223 U. S., 605, where Mr. Justice Hughes said:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. This exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded" (citing cases). "And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to State officers seeking to enforce unconstitutional enactments" (citing many cases), "and it is equally applicable to a Federal officer acting in excess of his authority, or under an authority not validly conferred" (citing many cases. See, also, *Waite v. Macey,* 246 U. S., 606; *McFarland v. Sugar Co.,* 241 U. S., 79; *Vicksburg Water Works Co. v. Vicksburg,* 185 U. S., 65).

And, furthermore, where the official asserting power conferred by a statute acts in excess thereof, such excessive action will be enjoined (*Gegiow v. Uhl,* 239 U. S., 3; *Waite v. Macey,* 246 U. S., 606; *American School v. McAnnulty,* 187 U. S., 94; *Morrow v. Jones,* 106 U. S., 466; *Bacon v. Rutland,* 232 U. S., 134).

In *Santa Fe, etc., v. Lane,* 244 U. S., 442, 498, it was declared:

> "On the contrary, if the demand was unlawful, * * * the complainant was entitled to sue in equity to have the defendant enjoined from insisting upon or giving any effect to it. The hazard and embarrassment incident to any other course were such as to entitle it to act promptly and affirmatively, and,

of course, there was no remedy at law that would be as plain, equitable, and complete as a suit such as this against defendant." (See, also, *Truax v. Raich*, 239 U. S., 33.)

If, as we shall endeavor to demonstrate, this statute is (*a*) unconstitutional, or (*b*) the exercise of power thereunder in excess of that conferred, then under the foregoing decisions the remedy by injunction is without question.

POINT III.

Fixation of Prices Void.

The record shows that the Fair Price Commissioner in Mississippi issued this pronunciamento:

> "Fair price committees are advised that the commissioner for Mississippi has this thirtieth day of April fixed and *does hereby promulgate* the following *maximum prices* and *maximum margins of profit* which a *retail merchant* handling *the following-named articles* of merchandise *may charge*, and these *prices* and *margins* of profit *are based on actual, original cost*, plus freight or express and war tax, and *they are maximum;* merchants may sell for *less*.
>
> "Men's and boys' suits costing up to $25, margin of profit 33⅓ per cent; costing from $25 to $50, inclusive, margin of profit 35 per cent. The commissioner fixes no margins on suits costing merchant above $50.
>
> "Ladies' and misses' suits and dresses, same margin of profit as on men's and boys' suits.
>
> "Men's, ladies', and children's shoes costing up to $3, margin of profit 25 per cent; costing from $3 to $8, margin of profit 30 per cent; costing from $8 to $10, inclusive, 33⅓ per cent. The commissioner fixes no margin on shoes costing merchant above $10.
>
> "Men's and children's hats costing up to $5, margin of profit 30 per cent; costing from $5 to $10, inclusive, 40 per cent; all straw hats, margin of profit 40

per cent. No margin fixed on hats costing merchant above $10.

"Ladies' and misses' hats costing up to $5, margin of profit 30 per cent; costing from $5 to $10, margin of profit 40 per cent. No margin fixed on ladies' hats costing merchant above $15.

"Dry goods: The margin of profit on *all staple dry goods* is 33⅓ per cent; the margin of profit *on all fancy dry goods* is 40 per cent.

"Men's collars: The maximum price which may be charged for men's stiff collars (standard brands) is 25c." (Italics ours.)

This covers (*a*) a fixation of price *on actual original cost*, plus freight or express and war tax; (*b*) covers *all staple dry goods* and *all fancy dry goods*, and disregards the *rendition of services* in *operating* (*a*) *a style shop* (*b*) with reference thereto procuring those things requisite therefor, and (*c*) other factors in the statement delineated.

Under the Lever Law, the State Fair Price Commission has promulgated this price list, and has sought, and is seeking, to indict any person who departs from the appointed path. His capability was in question, his ability was impugned; yet the fixation of these prices was made absolute and any deviation denounced as a crime.

The right to fixation of prices does not exist under the present statute. The verbiage thereof is almost that of the original Interstate Commerce Act, wherein Mr. Justice Brewer, in *Interstate Commerce Commission v. Railroad*, 167 U. S., 505, said:

> "First. The power to prescribe a tariff or rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and having respect to the large amount of property invested in railroads of various companies engaged therein, the thousands of miles of road, the millions of tons of freight carried, the varying and divers conditions attaching to such carriage, is a power of supreme delicacy, and importance.

> "Second. That Congress has transferred such power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission, it cannot be doubted that it would have used language open to no misconstruction, but clear and direct."

Furthermore, as there stated—

> "It is one thing to inquire whether the rates which have been charged and collected are reasonable; that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future; that is a legislative act."

And, after reviewing the whole subject, the court concluded:

> "Our conclusion, then, is that Congress has not conferred upon the Commission the legislative power of prescribing rates, either maximum or minimum, or absolute. As it did not give the express power to Congress, it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum, or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad company should follow the rates thus determined to have been in the past reasonable and just."

This judicial interpretation of words previously employed should be integrated into the construction of the present statute. (See, also, *Railroad Co. v. Commission*, 162 U. S., 184; *Interstate Commerce Commission v. Baird*, 194 U. S., 42.)

Notwithstanding the want of power, the Mississippi Fair Price Commission has, without a judicial hearing, promul-

gated rates—prices—which are absolute, and for non-conformity therewith, forthwith criminal prosecutions are commenced.

(*a*) Fundamentally, the fixation of a rate is a legislative function (*Minneapolis, etc., v. Minnesota,* 134 U. S., 467; *Ohio Valley Water Co. v. Borough,* — U. S., —; U. S. Adv. Shts., 585; *Oklahoma Operating Co. v. Love,* — U. S., —; U. S. Adv. Shts., 383; *Lake Erie, etc., v. State,* 249 U. S., 424; *Prentiss v. Atlantic Coast Line Co.,* 211 U. S., 210; *Missouri-Pacific R. R. v. Tucker,* 230 U. S., 347).

No authority was given, in any way, in anywise, to review the reasonableness of the proclaimed prices. There was the legislative fixation thereof by appellees, not assailable in any court, and for a violation of which appellees saw to it that appellants were visited with the most destructive instrumentality known to the American public, the classification as a "slacker" in war and as a "profiteer" in peace. The effect thereof is without adequate judicial admeasurements. The exercise by an official, subject to no control, biased by his status, ignorant of the proper factors to be integrated, makes the rights of appellants absolutely without safety, save they be vouchsafed the plenary protection uniformly accorded by this court, that in all such cases the exercise of such a power would be absolutely void; and so, without fear of contradiction, we classify the price-fixing list of appellee Locke.

As said in *Valley Co. v. Borough,* — U. S., —; Adv. Shts., 586:

> "The order here involved prescribed a complete schedule of maximum future rates and was legislative in character (citing cases). In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise, the order is void because in conflict with the due-process clause, Fourteenth Amendment" (citing cases).

In *Oklahoma Operating Co. v. Love*, — U. S., —; U. S. Adv. Shts., 384, it was stated:

> "The order of the Commission prohibiting the company from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribed maximum rates for the service. It was, therefore, a legislative order, and under the Fourteenth Amendment plaintiff was entitled to an opportunity for a review in the courts of its contention that the rates were not compensatory" (citing cases. See, also, *Missouri v. C., B. & Q.*, 241 U. S., 533; *Wadley Southern R. R. Co. v. Georgia*, 235 U. S., 651; *Minneapolis, etc., v. Minnesota*, 134 U. S., 467).

When Locke promulgated his price list, his action was legislative. To constitute due process under the Fifth Amendment, it was requisite that judicial investigation be vouchsafed, both as to the law and the facts. Failing therein, his pronunciamento was inherently void, as conflicting with fundamental constitutional inhibitions.

(*b*) But, in the pronunciamento issued, there was embraced all *staple* and *fancy dry goods*, irrespective of character, as "wearing apparel." There was no segregation or separation of that which was to be characterized as "wearing apparel" from that which was to occupy the category of staple and fancy dry goods (*U. S. v. American Woolen Co.* (Dist. Ct. N. Y.), 265 Fed., 404).

Appellants were required by the order to comply as to *all dry goods* save those which were sought to be eliminated from the express provision of the act by the declaration of the Fair Price Commission. The act, as drawn, applied to *all* "wearing" apparel; yet, in Mississippi, the Commissioner saw fit to limit the wearing apparel expressly embraced by the statute to "men's and boys' suits" costing the merchant not more than $50; to misses' and ladies' dresses costing the same; to shoes costing less than $10; to hats costing less than $10

for men and children, and for ladies costing less than $15. Despite the verbiage of the act, such are the limitations integrated by a ministerial officer. Such regulations must, to be valid, find support in the statute itself; and all departmental interpretations contradictory to or in excess of the statutory authority are void (*Gegiow v. Uhl*, 239 U. S., 3; *Gonzales v. Williams*, 192 U. S., 1).

When appellee Locke saw fit to limit the operation to certain prices, and then further to extend his authority to *all* dry goods, thereby he was guilty of flagrant deviations, both in inclusion and in exclusion, in this: That, if valid, he unduly narrowed the provisions of the statute, contrary to its terms; and, if valid, he unreasonably extended it to embrace a class whereover he was absolutely without authority, thus exemplifying the dangers incident to personal action without the fundamental control of constitutional limitations, thereby creating a government not of laws, but of men.

(*c*) Fundamentally, Locke disregarded elements necessarily integrated into the cost price of that specifically offered by appellants for sale. His lack of knowledge and want of capacity are mirrored in eliminating essential cost factors to be found in serving to the public those things which are expressions of a passing fancy.

It appears by the bill that appellants have operated a *style shop*, wherein those commodities, whereover Locke claims authority, in part, are utilized as a means of supplying an active demand of the women, co-ordinating their attire to the ever-changing demands of fashion. The importance of maintaining such an organization is shown and the expense therefor is detailed. Notwithstanding this actual existence of such operating cost, Locke (the Constitution to the contrary notwithstanding) has seen fit to arbitrarily prohibit the proper cost allocation, in conducting this business, to the department wherein such business is done.

As said in *Ft. Smith, etc., v. Mills*, — U. S., —; Adv. Shts., 631:

> "It was not decided * * * that Congress could or did require a railroad to continue in business at a loss."

In *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S., 212, the court said:

> "We are of opinion that the test applied was wrong, under the decisions of this court. A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage" (citing cases). * * * "The plaintiff may be making money from its sawmill and lumber business, but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it."

Turning to the decision covering the precise point in *Northern Pacific R. R. Co. v. North Dakota*, 236 U. S., 585, 595, 599, 600, 604, this court says:

> "But a different question arises when the State has segregated a commodity, or a class of traffic, and has attempted to compel a carrier to transport it at a loss or without substantial compensation, even though the entire traffic to which the rate is applied is taken into account."

Thereafter this court reviewed the decisions and concluded:

> "The constitutional guarantee protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity * * * has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied

> a reasonable reward for its services, after taking into account the entire traffic to which the rate applies, it must be concluded that the State has exceeded its authority."

And, under similar circumstances, under the Fifth Amendment, that the United States would have exceeded its authority.

And in that opinion it said:

> "The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such apportionment, but when conclusions are based on cost, the entire cost must be taken into account."

So, when the Fair Price Commissioner came to deal with an article wherein a style element of cost was integrated, due to a New York connection or a Paris association, and a tendency to pass out after a brief vogue, he exceeded his authority by seeking to limit the profit with reference thereto to an amount wherein no such elements were integrated.

The *war power* cannot be extended to cover the question as to how women are to dress.

The want of capacity was reflected in the short-sighted promulgation of inappropriate principles to fundamental factors which could not possibly be eliminated from consideration (*Norfolk & Western Ry. Co. v. Conley*, 236 U. S., 605).

There is possessed by neither the United States nor its representatives the power to eliminate from the cost of doing a particular class of business those items necessarily integrated therein by the essential nature of the operation. There is no departmental power to repeal economic fundamentals.

POINT IV.

The Lever Law Unconstitutional, Especially the Departmental Interpretation Thereof in Mississippi, Because Violative of the Fifth Amendment, in—

(1) *Taking private property for private use without due compensation;*

(2) *Depriving appellants of liberty and property without due process of law.*

The section under discussion prohibits the exacting of "excessive prices for necessaries," and the departmental interpretation of the power is found in the pronunciamento. This contention challenges the validity of the act; but, should that be sustained, nevertheless the asserted exercise conflicts with the constitutional provision, in that property is required to be sold at less than its actual value. Reproductive cost is eliminated, and in lieu thereof, under espionage, a system of enforced distribution sought to be foisted upon a free people, wherein fundamental economic laws are eliminated. These contentions, therefore, conduct us back to a definition of liberty, the subject of the protection of the Constitution.

In *State v. Julow*, 31 S. W., 782, it was said:

> "These terms—'life,' 'liberty,' and 'property'—are respective terms, and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the rights of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may—all our liberties, personal, civil, and political—in short, all that makes life worth living; and of none of these liberties can any one be deprived except by due process of law (*Story Const.* (5th ed.), par. 1950). Now, as before stated, each of the rights heretofore mentioned

carries with it, as its natural and necessary coincident, all that effectuates and renders complete the full, unrestrained enjoyment of that right. Take, for instance, that of property. Necessarily blended with that right are those of acquiring property by labor, by contract, and, also, of terminating that contract at pleasure, being liable, however, civilly for any unwarranted termination. In the case at bar, as will be remembered, the contract was not made for any definite period. From these premises it follows that *'depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision.'* (Italics ours.) (See, also, *People v. Otis*, 90 N. Y., 48; *State v. Goodwill*, 33 W. Va., 179; *Leep v. Railway Co.*, 58 Ark., 415.)

In *State v. Kreutzberg*, 90 N. W., 1109, it is said:

"It has become settled, for example, that liberty does not mean merely immunity from imprisonment, and that 'property' is not confined to tangible objects which can be passed from hand to hand; that within the former word is included the opportunity to do those things which are ordinarily done by free men, and the right of each individual to regulate his own affairs, so far as consistent with the rights of others; and within the latter those rights of possession, disposal, management, and of contracting with reference thereto, which renders property useful, valuable, and a source of happiness, right to pursuit of which is preserved" (citing cases).

In *Van v. Edwards*, 67 L. R. A., 464, it was said:

"The word 'property' is of very broad signification. It is defined as 'rightful dominion over external objects; ownership; the unrestricted and exclusive right to a thing; the right to dispose of the substance of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. * * * Property is the highest right a man can have to anything, being used for that right which one has to lands or tenements, goods, or chattels, which no

way depends on another man's courtesy. * * * A right imparting to the owner a power of indefinite user, capable of being transmitted to universal successors by way of descent, and imparting to the owner the power of disposition. * * * *The right of property is that sole and despotic dominion which one man claims and exercises over the external things in the world in total exclusion of the right of any other individual in the universe.* It consists in the free use, enjoyment, and disposal of all of a person's acquisitions, without any control or diminution save only by the laws of the land.' (*Black, Law Dict., pp. 953, 954.*) * * *

"But the very word 'property' includes the very right of possessing, enjoying, and disposing of a thing, and when used subjectively, it means that with respect to which this right exists, or that which is one's own." (Italics ours.)

In *Wynehamer v. People*, 13 N. Y., 396, it was said:

"Now, I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. In a state of nature property did not exist at all. 'Every man might then take to his use what he pleased, and retain it if he had sufficient power; but when man went into society, and industry, arts and sciences were introduced, property was gained by various means, for the securing whereof proper laws were ordained' (*Tomlin's Law Dict.*, Property, 2 *Bl. Com.*, 34). Material objects, therefore, are property in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are, fundamentally, the right of the occupant or owner to use and enjoy them exclusively, *and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so, whatever removes the impression destroys the notion of property, although the things themselves may frequently remain untouched.*" (Italics ours.)

"Nor can I find any definition of property which

does not include the power of disposition and sale, as well as the right of profit, use, and enjoyment."

* * *

"Chancellor Kent says (2 Com., 320): 'The exclusive right of using and transferring property follows as a natural consequence from the preservation and administration of the right itself.' And again (page 326): 'The power of alienation of property is a necessary incident to the right, and was dictated by mutual convenience and mutual wants.' By another author, property is defined as 'an *exclusive* right to things, containing not only a right to use those things, but a *right to dispose of them either by exchanging them for other things*, or giving them away to any other person without consideration, or even throwing them away (*Bouvier's Law Dic., Tit.* 'Property'). These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale, and placed without the protection of law, it were well that the attempt should be made." (Italics ours.)

In *Block v. Schartz*, 65 L. R. A., 311, it was said:

"Property has some essential attributes without which we could not conceive it to be property. Among these are the use, enjoyment, susceptibility of purchase, sale, and of contracts in relation thereto. The taking away of any one of the essential attributes may violate the constitutional guaranty that no person shall be deprived of his property without due process of law as clearly as in the case of a physical taking without due process of law. An enactment, therefore, like the one in controversy, which deprives an owner of his liberty to sell his property, or contract in relation thereto, in the same manner as others engaged in the same business may lawfully do, invades his rights guaranteed by the Constitution and cannot be upheld; and to prevent the free exchange and sale or disposal of property according to the immemorial uses of trade is to deprive it of one of its main attributes. 'The third absolute right, inherent in every Englishman,' said Sir William Blackstone,

in his classification of fundamental rights, 'is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land' (1 *Black. Com.*, 138). The right thus referred to and defined by the illustrious commentator is absolute and inherent in every American subject of the United States by virtue of the supreme law of the land. Therefore, 'When a law annihilates the value of property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended especially to shield private rights from the exercise of arbitrary power' (*Wynehamer v. People*, 13 N. Y., 378, 398). * * *

"In *Third National Bank v. Devine Grocery Co.*, 97 Tenn., 663; 34 L. R. A., 445; 37 S. W., 390, it is said: 'To take from property its chief element of value, and to deny to the citizen the right to use and transfer it in any proper and legitimate method, is as much depriving him of his property as if the property itself was taken.' In *People ex rel. Manhattan Savings Trust v. Otis*, 90 N. Y., 48, it was said: 'Depriving any owner of property or one of its essential attributes is depriving him of his property within the constitutional provision.' In *State v. Goodwill*, 33 W. Va., 179; 6 L. R. A., 621; 25 Am. St. Rep., 863; 10 S. E., 285, it was said: 'The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor—which is, as we have seen, property—is protected by the Constitution.' * * * So, in *State v. Loomis*, 115 Mo., 307; 21 L. R. A., 789; 22 S. W., 350, it was observed: 'Liberty, we have seen, includes the right to acquire property, and that means and includes the right to make and enforce contracts.'"

These fundamental definitions have received the unqualified sanction of this court.

In *Allgeyer v. Louisiana*, 165 U. S., 578, it was said:

> 'The liberty mentioned in that amendment means not only the right of a citizen to be free from the mere

physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of a citizen to be free in the enjoyment of all of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

"It was said by Mr. Justice Bradley in *Butchers' Union, etc., Co. v. Crescent City, etc., Co.,* 111 U. S., 746, in the course of his concurring opinion in that case, that 'the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase, "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "all men are created equal, that they are endowed by their Creator with certain inalienable rights; and among these are life, liberty, and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen.' Again, on page 754 (589), the learned justice says: 'I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.'" * * *

"Again, in *Powell v. Pennsylvania,* 127 U. S., 678 (32 L. R., 253, 256), Mr. Justice Harlan said: 'The main proposition advanced by the defendant is that his enjoyment, upon terms of equality with all others in similar circumstances, of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law." (See, also, v. 17 *Revised Edition, Rose's Notes,* 921, showing the subsequent development of this declaration, especially *Lochner v. New York,* 198 U. S., 45; *Atkin v. Kansas,* 191 U. S., 207; *Lumber Company v. Dakota,* 226 U. S., 162; *Crane v. New York,* 239 U. S., 195.)

In *Adams v. Tanner*, 244 U. S., 596, where there is a review of the decisions, the court said:

> "The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public."
>
> See, also, *Truax v. Raich*, 239 U. S., 33.

Again, in *Insurance Co. v. Dodge*, 246 U. S., 374, the court said:

> "So to contract is a part of the liberty guaranteed to every citizen. The doctrine of this case has been often reaffirmed and must be accepted as established."

See, also, *United States v. Knight*, 156 U. S., 1, where, as remarked by Chief Justice Fuller—

> "It is vital that the independence of the commercial power and of the police power and the delimination between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

All factors to be dealt with in this cause are State factors, wholly uncorrelated to war, totally co-ordinated to the State sovereignty. The assertion with reference to this particular form of authority would fall directly within the condemnation of the Chief Justice in that case at page 15—"A situation more paralyzing to the State governments, and more provocative of conflicts between the General Government and the

States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine," being a quotation from the opinion in *Kidd v. Pearson,* 128 U. S., 1.

See, also, *McFarland v. Refining Co.,* 241 U. S., 79.

If the statute does not, then the departmental interpretation integrates into the right of private contract, at Jackson, Mississippi, a governmental license, whereunder one of full age, desiring to sell to one of full age, desiring to buy, must have their agreement conform, not to their wills, but to that of the Price Commissioner. This individual, under assumed power, has entered our store, being thereunto not invited, and has, over our protest, without property rights in our goods, made his *ipse dixit* the measure of our right of disposition in every department where he saw fit to enter. These commodities were not affected with a war use; it was a time of peace, and he is assuming to act under the executive appointment and demanding that our private property be made subject to disposition, not at our will, but at his will. It is demanded that the owners, in virtue of such ownership, shall yield, under a contract made without consent, to another that which is their very own.

Thus, in America, there is a suspension of the right to contract, and a method of disposition is substituted whereunder private initiative is throttled and destroyed. If business is to be done, the right of assent, agreement, is taken away and in its room appears servile co-ordination to governmental formula. We are no longer free, but are under the tutelage of enthroned autocracy. America has been bereft of that which made the Yankee's fame world-wide. The right of private contract is paramount to Federal power, even when it seeks to make liberty subversive to actual war necessity.

To improve production, to stimulate distribution, the right of private contract is destroyed. I can no longer say, "I won't" when a price that is unsatisfactory to me is offered for

that which is mine, but must respond, "I will" when I mean "I won't." This passes the limit vouchsafed freemen and brings us well within the province of slaves. Initiative is destroyed; all are reduced to a formula; life is devoid of variety. The genius and the dullard must pursue the path appointed; all incentive to service has been eliminated by withdrawal of reward of merit. Not so under the declarations of this court. In *United States v. Freight Association*, 166 U. S., 320, it is said:

> "The trader or manufacturer carries on an entirely private business and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the articles in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses; he may cease to do business whenever his choice lies in that declaration." (See, also, *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S., 211; *Miles Medical Co. v. Park*, 220 U. S., 373; *United States v. Colgate*, 250 U. S., 307. See, also, *Adair v. United States*, 208 U. S., 161; *Coffage v. Kansas*, 236 U. S., 1.)

Therefore, with this right to property, to liberty, Congress has attempted to deny appellants the right to make a contract incident to the conduct of their business, wherein it is requisite to preserve the same from the disintegrating influences brought about by the present war and set forth at large in the bill of complaint.

It there appears, admitted by appellees, that appellants were the owners at the inception of the war of a stock of merchandise, actively engaged under a fixed policy of selling the commodities among customers. Due to said ownership, an uplift occurred reflecting paper profits due to such possession, but which paper profits have not been withdrawn from the business, but have been left there to continue, as a reserve, to insure its solvency when the stock of goods purchased at the higher figures shrinks back to the normal.

In short, such reserve will have been utilized as an insurance against an inevitable consequence of the present.

But this reserve is not excessive; its origin is delineated at length, and it accrues from the conduct of a well co-ordinated business, wherein the cost prices charged are, as to staples, less than those promulgated in the edict, but in certain departments they are larger, where the ignorance of the Commissioner failed to integrate the requisite amount necessary to maintain the buying forces in New York and abroad, the necessary depreciation due to the transient character of the demand, bottomed upon a style expression and other factors set out at large in the bill, whereto reference is made.

It appears that the Commissioner in issuing the edict saw fit to disregard and disallow, in taking jurisdiction of all things whatsoever composing staple and fancy dry goods, the fact that certain merchants bought for cash over the counter through drummers sent by sellers to seek business, and therefore in the selling price as cost of acquisition was found the cost of disposition by a producer to retailer; whereas in the case at bar, in the class of commodities under discussion—luxuries, semi-luxuries, feminine style—appellants sought the primary markets and there winnowed out of the mass offerings those which would appeal to their customers, and therefore took from the producer the cost element, *i. e.*, of selling through representatives; and yet the edict did not see fit to make any allowance for this essential difference.

The United States is a government of limited powers, integrated into the exercise of every one of which is the Fifth Amendment, operative by its express provision both in peace and in war, and whereby the Congress is incapacitated from doing that which shall deprive any person of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

The admeasurement of the power of Congress is accurately reflected in the limitations upon the power of the States under the Fourteenth Amendment. *Shaffer v. Carter*, — U. S., —;

Adv. Shts., 241; *Hamilton v. Distilleries*, 251 U. S., 146, where this court unanimously declared:

> "The war power of the United States, like its other powers, and like the police power of the States, is subject to applicable constitutional limitations (citing cases). But the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon the State power."

The Commissioner in Mississippi has included within his jurisdiction *all* dry goods, staple and fancy, "necessaries" and luxuries. The character of the inclusion depends upon the expression of the personal delectation of the Commissioner; and thus he has entered our store, and there, upon each article embraced within its confines, impressed an arbitrary selling price, wherein reproduction value is disregarded; and he has integrated an expression of his will as a necessary factor in the disposition of every paper of pins embraced within our establishment. Conformity in each particular to the edict is requisite, notwithstanding war has not been flagrant in Mississippi, though the courts remain open, and the right of private contract under the Constitution been in nowise abrogated.

Here we have the conduct of a business wherein, by utilizing an expensively maintained corps of trained buyers outside of the State, we have sought to build up a trade with those who made the following of the fashions their principal occupation. The United States has not sought in anywise to prohibit the production of such commodities thus demanded by its citizens, though the applicability thereto of them for warlike purposes is of the utmost impossibility. The sheerest of fabrics, the most exaggerated of designs, seem to appeal; and yet Labor was allowed to produce. Capital was permitted to become integrated and proper distribution must be allowed, and it was known of all men that the disposition of such articles involved the outlay of an amount in

excess of the percentages fixed in the edict. Thus the constitutionality of a regulation of the sale of that which was the gratification of a personal whim is sharply brought in question. In fine, is the regulation of feminine fashion a necessary war measure, when the power of the United States is limited to carrying on war, and not to defining what, to accentuate charms, shall be worn by the women of the land?

But one step further: In this store, owned absolutely, is property where, due to *the inflation of the currency,* there has been a rise in the *conversion value*—the dollar expression—over the amount at which goods were originally bought. But the amount of the excess of the dollar expression, translated into those things that appellants would have, would not now reach those which could have been purchased if the conversion had occurred at the date of the original acquisition. In short, the utilization of the uplift at its height will not be adequate to bring into our possession lawfully that which could have been brought had we sold when the goods were first purchased and when the currency was not inflated. Despite the inflation, the edict reads that *cost price* is the controlling factor; and all monetary changes are brushed aside by the will of the Commissioner.

One step further: We have in our establishment, owned absolutely, property whose *conversion value* is 100 per cent over what it was when it was originally acquired. Forming a part of the same stock, we have other articles of the same character bought as their market price advanced, all indiscriminately mixed, each capable of being bought by a purchaser, all of the same quality; and yet, under the edict, we, though a one-price store, must sell to one customer at one price, to another at another price, and yet to another at still a third price. Our allocation must be accurate; we must not confuse goods purchased at one time with goods purchased at another. The Commissioner is absolute in his orders—*cost price, plus*—whenever a sale is made. His edict says that these prices are fixed and must be conformed to, thus inte-

grating his will into our business to transform it from a one-price store, marked in plain figures, to a many-price store, impairing irretrievably the value of our good-will, built up through years of labor, involving thousands of dollars of expense.

One step further: We have *goods* whereof we were the owners, paid for in full, which in the fullness of time *have advanced in value*, which we cannot replace for less than an amount 100 per cent over their original cost. With this uplift we have had no connection whatever; it accrued in virtue of our ownership. That it will disappear is probable, nay, certain, if we continue to own; and if we convert at the present price and reinvest, as we are compelled to do in our business, necessarily when normal prices are restored we shall be possessed of the same commodities, the same stock, neither richer nor poorer, save for garnering our legitimate distributor's margin. In fine, nothing is more uncertain and calls for greater caution on the part of a merchant than the violent fluctuation wherewith he is now called upon to deal. Unlike the manufacturer, he cannot cover his purchases by short sales, so as to insure his manufacturer's profit; but from the period of purchase to the period of disposition he must take the risk of declines, of vacillations, of collapse of the market. To overcome these differences, serious in the extreme, we assert that we have the inalienable right of private contract. The goods wherewith we deal are not necessaries—at least, so far as this controversy is concerned—but the expressions of style, which are changing every day.

Furthermore, a business of the magnitude of appellants' is not a thing that can stand still; it cannot cease to operate; its going value is property; its good-will is property (*Denver v. Water Co.*, 246 U. S., 191; *Gas Co. v. Des Moines*, 238 U. S., 153), wherefor, compensation, if taken, must be made under the Fifth Amendment. We cannot cease to do business. This would mean the disintegration of our establishment. And yet this law, as interpreted by the Commissioner,

has so integrated his personal opinion into every contract which we make as to require that, if we conform thereto, our business be foreordained to destruction, our property be taken by the Government without compensation.

One step further: We have purchased a commodity whose dollar expression has advanced in value, so that its replacement cost is, say, 100 per cent more than the original. Now, this article is desired to be purchased by one employed by the railroads, whose salary has been increased at the present time adequately to cover the advance in the cost of living. In justice, having received this advance at the hands of the Federal Government, in virtue of its power, duly exercised, can he, who has so thus profited, demand of appellants that appellants shall sell this commodity, whose price has thus advanced, to this employee at the pre-war price when such employee, in virtue of the Federal power, has caused his compensation to be so raised as to reflect the advance in replacement value? By what authority can those who have thus profited deny to the one who has continued to be owner the right to convert in accordance with the standard fixed by the Federal authority that whereof he has through all this period continued the owner? All men are created free, are created equal, so the great Declaration runs; and if so it be, does that instrument, whose object is to form a more perfect union, establish justice, insure tranquillity, take from that equality, destroy that freedom, so that, before the law, there is one measure of right for one, while there is another measure for another? Under what authority has the wage-earner, when his wages under Federal power have been increased to reflect the uplift in the cost of living, to demand of appellants, who purchased this property and therefor paid, that property be to them surrendered upon a pre-war basis, so as not to mirror the uplift whereunder the wage award was made?

In short, having been vouchsafed the full amount of uplift, can the law now add thereto this additional profit, whereunto the owner has always heretofore been entitled?

One step further: An absolute owner of property, wherefor the full price has been paid, continues such possession. Can he be deprived of the operation of the fundamental economic law when so to do will unsettle all things?

One step further: Appellants are possessed of a suit of clothes, wherefor they have paid, the reproduction cost of which is $20, wherefor they have paid $10. John Smith into their store comes. Can he demand that this suit of clothes, of a replacement value of $20, be to him given upon a basis of $13.33 under the edict issued? Where does the $6.66 replacement value—our property—go under this act? And by what authority can the rights of a purchaser, a person, be magnified at the expense of the rights of the seller, a person, so as to compel us, the owner, to give to him, who is not the owner, that whereof we are now lawfully possessed? The actual replacement value of our property is $20; its actual cost was $10, due to purchase at an anterior time. Eliminate inflation of currency and all other factors, and we challenge squarely and flatly, under the Federal Constitution, the right to say to us, a citizen, that we shall to another give property at less than its replacement value. Be the power what it may, at all times and at all seasons it is subject to the Fifth Amendment. It operates upon all instrumentalities, upon all persons (*Telegraph Co. v. Los Angeles*, 227 U. S., 278; *Ex parte Milligan*, 4 Wallace, 121-127; *Monongahela Navigation Co. v. United States*, 148 U. S., 336; *McCrary v. United States*, 195 U. S., 61; *United States vs. Cress*, 243 U. S., 316; *Hamilton v. Warehouse Co.*, 251 U. S., 146).

The right of private contract, the right of private property, are the inalienable rights, the absolute rights, of every Englishman under Magna Charter, of every American under the Constitution. It is not under any circumstances the right of either the President, or of Congress, to say unto one that they should give unto another property whereof the first was lawfully possessed. The United States has never, at any time, sought to take from any man any property without making

full compensation to him. The right has been vouchsafed at all times and at all seasons; has been fundamental, in times of war as well as in times of peace.

One step further: We have an actual open-market selling price of a commodity covered by the Lever Law, covered by the Commissioner's edict. That open-market selling price is above the original cost—for the sake of this argument, excessively so; but the price has been fixed by the interplay of economic laws, irresistible, indestructible, and the question now presented is whether, despite the property in appellants vested in those things whereof they are the absolute owners, wherefor they have paid, with reference to which they have incurred these hazards, can they now, contrary to their will, against their consent, be made to donate the excess over a reasonable profit, over original cost, to one who might desire to purchase?

Operation of our store must continue; the property in the form of good-will is ours; from us it cannot be taken.

Denver v. Water Co., 246 U. S., 191, *supra*.

Gas Co. v. Des Moines, 238 U. S., 153, *supra*.

The proposition is, we must sell; the expense of doing business compels it. And can, in the face of this expense, the law say that we shall disregard replacement value, actual open-market value, and *give* to one who would buy? There is no winking the fact that where a purchaser comes and there finds goods of a fixed, open-market value, if he takes these goods without leaving the open-market value, that he has taken our property, and that, too, without our consent.

In short, this law has to that extent assumed to nullify the right to contract, to abrogate the inalienable function of free will. There is a prohibition against Federal taxation without apportionment. Far better would it be to *donate* to the Government than to instill into the citizens the conception of obtaining property without therefor paying its full value. Honesty in transactions between man and man by this law

is imperiled; all of the baser forces, qualities, and tendencies are called into being; something for nothing is the rule, and in its attendant train there can be no return to the conception of an honest day's work for an honest dollar. The entire theory is at war with the restitution of normal economic operations. But the power of the Government does not embrace the power to take from one and give to another. Is not this the rule of the Soviet?

To return to our example: A suit of clothes, present replacement value, open market, $20; original cost, $10; reasonable profit fixed, 33⅓ per cent; total price allowed, $13.33. What are we going to do with the $6.67? Under the law, by ownership it belongs to appellants. Appellants desire to sell their property (must sell to keep their store open), whose replacement value is $20; this edict says we shall not receive but $13.33 therefor. What of the remainder? Instantly upon receiving it the purchaser could dispose of it for $20. Our contention is that John Smith, the purchaser, cannot be vouchsafed the benefit of this $6.67 under the constitutional limitations heretofore announced by this court.

In *Savings & Loan Ass'n v. Topeka*, 20 Wallace, 662, it was said:

> "A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.
>
> "The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the

judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments—implied reservations of individual rights, without which the social compact could not exist and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B (*Whiting v. Fond du Lac*, 25 Wis., 188; *Cooley, Const. Lim.*, 129, 175, 487; *Dill., Mun. Cor., sec.* 587)."

And then, again, the learned Justice Miller, at page 665, said:

"The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner, are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town" (citing to approve *Allen v. Jay*, 60 Me., 124; *Lowell v. Boston*, 111 Mass., 454).

In *Cole v. La Grange*, 113 U. S., 1, the head-note prepared by Mr. Justice Gray stated:

"The general grant of legislative power in the Constitution of a State does not authorize the legislature, in the exercise of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent, for any but a public object."

Again, in *Madisonville Traction Co. v. St. Bernard*, 196 U. S., 252; 49 L. Ed., 462, it was said:

"There ought not to be any dispute, at this day, in reference to the principles which must control in all

cases of the condemnation of private property for public purposes. It is fundamental in American jurisprudence that private property cannot be taken by the government, National or State, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments" (citing cases). "If the purpose be public, the taking may be outright, provided reasonable, certain, and adequate provision is made, at the time of appropriation, to ascertain and secure the compensation to be made to the owner" (citing cases). "Any State enactment in violation of these principles is inconsistent with the due process of law prescribed by the Fourteenth Amendment" (citing cases). "The position taken by the highest court of Kentucky on this general subject appears from *Tracey v. Elizabethtown, L. & B. S. R. Co.*, 80 Ky., 259, 269. It was said there: 'It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain, either as to the nature of the use or the necessity for the use of any particular property. For if the use be not public, or no necessity for the taking exists, the legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required.'"

Again, in *Green v. Frazier*, the same principle was recognized, the court quoting, to adopt, *Fallbrook Irrigation Dist. v. Bradley*, — U. S., —; Adv. Shts., 627:

> "Concluding the discussion of that subject the justice said: 'In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the State is confined to its depriving any person of life, liberty, or property without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law if it be taken by or under State authority for any other than a public use, either under the guise of taxation or by the assumption of

> the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal Government.' Accepting this as settled by the former adjudications of this court, the enforcement of the principle is attended with the application of certain rules equally well settled."

See, also, the approval of the *Topeka case,* page 629:

> "There was no right under any circumstances to take property without due process" (*Ft. Smith, etc., v. Mills,* — U. S., —; Adv. Shts., 630; *Brooks-Scanlon Co. v. R. R. Commissioner,* 251 U. S., 396).

To recapitulate: We have an original purchase at market price of $10 for a suit of clothes; there has been an uplift in the market price to $20; the replacement value, whereon the railroads are allowed to earn (*United States v. Commission,* — U. S., —; Adv. Shts., 367), is $20. Now, the owner of this property, whose dollar expression is twenty, without his consent, contrary to his wishes, but due to the autocratic dictation of this alleged law or of the alleged lawgiver, is compelled to sell this property at $13.33 and to vest in the purchaser thereby $6.67, which lawfully accrued to appellants in virtue of ownership. To preserve appellants' property status, they must pay $20 for a suit to replace the one sold for $13.33, and thus personally supply the $6.67 governmentally donated to John Smith. Has our Government ceased to be a government of laws and become a government of men?

Appellants did not derive their rights of disposition from the United States; they came, if from any government, the State of Mississippi. Therefore, as to these articles, we submit that the Lever Law is unconstitutional; but if not, that its interpretation is so vicious as to be made the subject of injunction against those seeking its excessive and wrongful enforcement.

POINT IV (b).

Lever Law Unconstitutional, Especially Departmental Construction Thereof, Because Violative of the Fundamental Guaranties Vouchsafed by the Sixth Amendment.

We subscribe to all contained in associate counsel's admirable brief; but there is an additional thought.

The prohibition is exaction of excessive prices for "necessaries." This is made a crime, if not violative of the Constitution. It was not a crime at common law. The exercise thereof was a right of property, as heretofore shown. The fixation, therefore, of the exercise of an innocent right as a violation of the public welfare is an importation of the times of personal government.

What is the exaction of an excessive price? Excessive as to whom, the buyer or the seller? Excessive as to what, time of acquisition or time of disposition? Excessive how, as an individual sale or as a sale integrated into the conduct of a general business? Excessive when, at the time made or at the close of the fiscal year, when the general balance sheet is struck? A criterion by definition of the crime is a constitutional requirement.

The legislature must prescribe a *definite standard;* each factor therein must be integrated by the legislature expressly, so that in the punishment therefor the courts will not be called upon to legislate.

Note appellants' turn-over, aggregating roughly a million dollars. Each article when sold bears a fixed relation to the total turn-over. Cost accounting, due to appellants' excellent management, has an accurate allocation, so that each department stands upon its own bottom and bears its own burdens. Allocation has been accurately made, presumptions have been controlled by facts, and a well established business built up, whose every function has been co-ordinated; but these are

now sought to be disintegrated and its existence destroyed by appellees under this vicious law; or, if not, by their construction of it.

As said in *Board of Trade v. Christie,* 198 U. S., 247:

> "But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain."

The total profit shown on the turn-over is 5.8 per cent, as against the amount paid the Government, as taxes, 5.6 per cent.

The act nowhere specifies how the factors of replacement, reproduction, obsolescence, individual sale as contradistinguished from a sale co-ordinated with other sales, shall be dealt with. In the statute there is no expression by the legislature as to each of these factors.

To revert: Appellants maintain high-salaried men in New York, connections in Paris, to procure certain classes of commodities first hand; other merchants buy from drummers, possibly, the same commodities. What is selling cost in one is buying cost in the other. Price fixation is but rate-making, and involves all of those uncertain factors wherewith this court is so familiar, beginning with the *Ames case,* 169 U. S., 466.

Now, the fixation of rates is not a matter of simple cost accounting, but must have integrated into it the ability to sell when there is a demand for the commodity, because people cannot be made to buy, despite the law endeavoring to compel the appellants to sell.

The fixation of a rate is a legislative act wherein the legislature must integrate all factors which are there to be placed (*Ohio Valley Water Co. v. Borough,* — U. S., —; Adv. Shts., 586; *Oklahoma Operating Co. v. Love,* — U. S., —; Adv.

Shts., 383; *Lake Erie, etc., v. Public Utility Commission*, 249 U. S., 424; *Prentiss v. Atlantic Coast Line Co.*, 211 U. S., 210; *Chicago, etc., R. R. v. Minnesota*, 134 U. S., 418).

The bill shows confiscation, and therefore, with the fixation challenged, as taking property without due process, the Constitution has vouchsafed a judicial hearing, both as to the law and facts, to ascertain the correctness of such rate; and where such legislative act fails to vouchsafe such a hearing it is void (*Ohio Valley Co. v. Borough*, — U. S., —; Adv. Shts., 586; *Oklahoma Operating Co. v. Love*, — U. S., —; Adv. Shts., 383; *Lake Erie, etc., v. Public Utility Commission*, 249 U. S., 424; *Missouri v. Chicago, etc., R. R. Co.*, 241 U. S., 538; *Wadley Southern R. R. Co. v. Georgia*, 235 U. S., 651; *Missouri-Pacific R. R. Co. v. Tucker*, 230 U. S., 347; *Chicago, St. Paul, etc., R. R. Co. v. Minnesota*, 134 U. S., 418).

These decisions uniformly condemn as unconstitutional every legislative fixation not judicially assailable without the incurring of fines and penalties. Constitutional guaranties demand a right to judicial review before the rate can be demanded, when the excessiveness is made a question. That the prices, rates, charged are not excessive is shown by the exhibit, and must be admitted. If they are reduced to conform to the statute, as interpreted, and the admirable correlation due to the genius of appellants in organizing their businesses is eliminated by the bungling edict, then we are foreordained to share the fate of a vast majority of merchants—bankruptcy.

POINT IV (c).

Lever Law, Particularly the Departmental Construction Thereof, Unconstitutional, Because Unauthorized by the War Power, in This, That (1) Not in a Territory Wherein War Was Flagrant, and (2) Limited as to Property and Liberty by the Fifth Amendment.

Under the decision of this court in *Connolly v. Sewer Pipe Co.*, 184 U. S., 540, discriminations are held violative of the Constitution when measured by this law. The sole justification for such discrimination can only be found in virtue of the alleged applicability of the war power, which, with deference, must be exercised in consonance with the Fifth Amendment.

The bill avers that the act, or, if not the act, then the departmental construction thereof embodied in the record, integrates into the disposition of every article sold in appellants' store the will of the lawmaking power, mirrored in an edict destroying free will upon the part of appellants in the disposition of their property. This act, or this departmental interpretation, integrates itself into the conversion of each article, and thereby limits the right of disposition of personal property carried in a department store, and the proposition involved is as to the right of thereby utilizing private property during the war period.

The United States was not in a condition of domestic violence; there was no suspension of ordinary methods of conducting business; the civil courts have not been designated as the instrumentalities of carrying on the war, if this act is to be justified thereby. All governmental functionaries sought to be vested with this plenary and overpowering authority are those created by the statute, deriving their functions under the Constitution and limited in their acts thereby. There is not in this act sought to be utilized the military

power, in any sense of the word. Martial law is not sought to be declared, but, on the contrary, is studiously avoided. This act must pass muster under the Constitution as applied to private property, not in time of actual war, but in places where the courts were open, discharging their normal functions without let or hindrance.

In re Egan, 5 Blatchf., 319, Mr. Justice Nelson, in defining martial law, declared:

> "All respectable writers and publicists agree in the definition of martial law—that it is neither more nor less than the will of the general who commands the army. It overrides and suppresses all existing civil laws, civil officers, and civil authorities, by the arbitrary exercise of military power; and every citizen or subject—in other words, the entire population of the country within the confines of its power—is subjected to the mere will or caprice of the commander. He holds the lives, liberty, and property of all in the palm of his hand. Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. The commander is the legislator, judge, and executioner. His order to the provost-marshal is the beginning and the end of the trial and condemnation of the accused. There may be a hearing or not, at his will. If permitted, it may be before a drum-head court-martial, or the more formal board of a military commission; or both forms may be dispensed with, and the trial and condemnation be equally legal, though not equally humane and judicious."

As stated in *Hare, American Constitutional Law*, Lecture XLII:

> "Martial law is something indulged, rather than allowed, as law, the necessity for discipline in our army being that which alone can give it countenance. And this indulged law was only to extend to members of the army, or those of the opposite army, and was never so much indulged as to be executed upon others; for others who are not listed under the army had no

color or reason to be bound by military constitutions applicable only to the army, whereof they were not parts. But they were to be ordered and governed according to the laws to which they were subject, though it were a time of war."

In *Smith v. Shaw*, 12 Johnson, 267, the limitation of martial law was confined strictly to those connected with the operation of the war, and did not extend to a citizen not subject to military authority.

The controlling case is *Ex parte Milligan*, 4 Wallace, 2, where, at page 118, the court said:

"The controlling question in this case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious States, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man?

"No graver question was ever considered by this court, nor one which more clearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited

people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written Constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it, this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning."

The court then further said:

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism; but the theory of necessity on which it is based is false; for

> the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

In concluding the opinion, this court said:

> "It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of actual military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion, it could have been enforced in Virginia, where the national authority was overthrown and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed and justice was always administered. And so, in the case of a foreign invasion, martial rule may become a necessity in one State, when in another it would be 'mere lawless violence.'"

Again, in *Bean v. Beckworth*, 18 Wallace, 510, the learned Justice Field said:

> "Nor do the pleas, whilst asserting that the acts, which are the subject of complaint, were done under the authority and by the order of the President, set forth any order, general or special, of the President, directing or approving of the acts in question.

> "For this last omission all the judges are agreed, without expressing any opinion upon the other omissions, that the pleas are defective and insufficient."

So, in the instant case, the allegation being admitted that there have been no proclamations by the President affecting the operation of this particular branch of the business, there is a right to enjoin those who are therefore left without authority.

Orders, especially directed, from the President as Commander-in-chief, are conditions precedent to the validity of the acts to be taken in war, and for this reason the appellees are wholly without the lawful power to proceed.

But, to return to the discussion with reference to private property in a territory where war is not flagrant, see *Mitchell v. Harmony*, 13 Howard, 115, where Mr. Chief Justice Taney said:

> "And the only subject for inquiry in this court is, whether the law was correctly stated in the instruction of the court; and whether anything short of an immediate and impending danger from the public enemy, or an urgent necessity for the public service, can justify the taking of private property by a military commander to prevent it from falling into the hands of the enemy, or for the purpose of converting it to the use of the public."

In answering that question, the Chief Justice said:

> "There are, without doubt, occasions in which private property may be lawfully taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.
>
> "But we are clearly of the opinion that in all of these cases the danger must be immediate and im-

> pending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."

The court thus makes the criterion a judicial question.

In *McLaughlin v. Green*, 50 Miss., 453, the Supreme Court of Mississippi declared:

> "Private property is sacred from the violent interference of others, and whoever takes, injures, or destroys it is a trespasser unless he shows a justification. Necessity—extreme, imperative, and overwhelming—may constitute such justification; but expediency or utility will not answer.
>
> "*Justification under a plea of necessity is always a question of fact to be tried by a jury, unless the law-making department has provided some other mode* (*Hale v. Lawrence*, 1 Zab., 730; *Mitchell v. Harmony*, 13 How., S. C., 115, *supra*). If 'necessity' be appealed to as excuse or justification, it must be shown to have sprung out of the circumstances that are alleged to have invoked it." (Italics ours.)

Again, at page 406, the court said:

> "Such a doctrine is subversive of all civil rights, and places the civil authorities in absolute subordination to the military. In *Colonel Mitchell's case*, 13 How., *supra*, the seizure of the goods, resulting in their ulterior loss, was made in the enemy's country. Yet he was held to be a tort-feasor, because the goods were not at the time exposed to capture by the Mexican army, and were not taken to be used in his own military operations. It was put upon Mitchell to show the one state of facts or the other, in justification."

Just as here it must be shown by evidence.
Further it was said:

> "It was not referred to an officer commanding military operations to judge finally and conclusively of the necessity of the seizure of the property of a citizen, lawfully with his property at that place; with less reason can it be claimed that General Tucker, who was commanding in this State, could, at his discretion, destroy the property of a citizen; and with the more force does the argument press upon him to show his right. * * *
>
> "When the plaintiff's whisky was destroyed, active hostilities had ceased; all the Confederate armies east of the Mississippi River had surrendered, and the whisky was not exposed to capture, nor could it have been necessary to General Tucker's military uses. But, more than this, martial law did not prevail, nor did there exist that state of things in which it could rightfully exist.
>
> "But the authorities, to which we have referred, distinctly announce the doctrine that in flagrant war power does not belong to a military officer, merely as such, to take or to destroy the property of the citizen, unless a necessity exists to apply it to military purposes, or to prevent its capture by the enemy. * * *
>
> "The authorities teach the further doctrine, that military orders do not protect and justify an invasion of private property, either in war or in time of peace, if done without the warrant of the law, applicable to the one State or the other."

See, also, *Farmer v. Lewis*, 1 Bush., 96, especially note thereto; 89 Am. Dec., 610. See, also, note, 65 L. R. A., 193; note, *County v. Rankin*, 2 Duvall, 502; 87 Am. Dec., 505; 45 L. R. A. (N. S.), 996; see, also, *State v. Brown*, Annotated Cases, 1914C, page 1, note thereto. Note that the court in these cases tried the facts with reference to property without influence by the declarations of any one.

In virtue of the alleged war power, the civil authorities have seen fit here to confiscate, not all of appellants' property.

but just so much thereof as to them seem proper—that is to say, that portion of the value thereof in excess of the original cost, plus an arbitrary margin of profit. The war power never could have been so integrated into a taking of property. It justified the taking, for the carrying on of the war, under proper circumstances, of all the property, but it did not extend to the taking of such portions as are here sought to be destroyed, under these circumstances. This war power is required to be exercised subject to the Fifth Amendment (*Hamilton v. Distilleries*, 251 U. S., 146).

We have presented a foreign war, when property in the United States is sought to be taken for less than its value, under a statute passed in virtue of the alleged war power.

If this fixation be held to be but a departmental construction, then such departure will warrant injunction against the officer who has so transgressed constitutional authority.

But we submit that under the war power private property in the United States did not become, when it consisted of the character of property whereof appellants were possessed, affected with a war use so as to authorize its destruction, or partial destruction, by any instrumentality, military or civil.

The plea is that war beyond the seas operates to vest power to take private property of a citizen in this country. Upon this proposition we squarely join issue as to the validity of the Government's act, so far as it affects property belonging to an individual sought to be taken, without compensation therefor; not for the benefit of the United States, but for the benefit of some other citizen, neither person being in the service of the Government at the time.

This is not an exercise of martial law, or of military law, by any stretch of the imagination, but is the suspension of a constitutional guaranty in time of local peace by the existence of foreign war. Power to declare war necessarily involved a foreign power against whom such war was to be declared, and the waging of war is in civilized times against such

foreign power and not against the property of citizens of the State which has declared such war.

In short, the declaration is against the enemy, and not those from whom our soldiers must be recruited. Their private property remains property, subject to all the constitutional guaranties, and as such cannot be taken without compliance with the constitutional requirements. The only time or place when private property can be taken under the war power is (1) in the place where war is flagrant; (2) at the time when war is flagrant; (3) by a person acting under military authority; (4) when such taking is directly promotive of the welfare of the waging of the war.

All of these methods have been laid down expressly by the decisions cited above, and their application to the Lever Law demonstrates its invalidity, when thereby property is taken, not for the benefit of the Government, but for the benefit of an individual.

Constitutional guaranties have ceased to exist; if the military power, as held in *Hamilton v. Distilleries, supra*, is enabled to take that which is private property for the benefit not of the United States, and it is truly impotent when such property is sought to be utilized by the United States for purely private purposes, taken from one to be given to another.

But it may be said that the Lever Law affects only excessive prices, and that the departmental construction, concurred in by some of the lower Federal courts, is erroneous. But, be that as it may, this law as now enforced seeks Federal regulation of intrastate transactions with personal property, wherever the United States has no further authority than that conferred by the Constitution, and the necessity for its act cannot extend its authority to the displacement of the State's power in the premises.

It seems to be overlooked that the United States has but a delegated function in the premises; that its acts are limited and circumscribed, and yet the war power, while supreme,

does not supersede State existence, and over the ordinary affairs the State still, under the Ninth and Tenth Amendments, must exercise their reserved power.

Should it for a moment be held that personal private property constitutes a subject for confiscation during war periods from one citizen for another citizen, then our boasted civilization has assumed an attitude which differs nothing from the Russian Soviet.

Under the Constitution, these guaranties are intended to be substantial; they are declared to be the supreme law of the land; and yet, in America, shall it be, as during the time of Cæsars, that our forms of freedom persist while their substance has departed?

All of the nations against whom war was declared by us and our allies are now at peace, the treaty with Turkey having just been signed, and under the war power we have now admittedly a state of peace. A treaty has not been signed, and how far the provisions of the Constitution are a limitation upon the treaty-making powers was left an open question in *Missouri v. Holland*, — U. S., —; Adv. Shts., 461; but, being a government of delegated powers, the exercise of the power must be in virtue of the delegation, and, so being, must concur with all provisions of the instrument whereunder the exercise is made. The States would never have assented to any such exercise if it had been surmised that under the treaty power the safeguards, otherwise created, could have been for naught held. The Constitution does not sleep, and thereunder the President and Senate are without power to deprive any person of property without due process of law, or to perpetuate unconstitutional personal discriminations which are now extant only in virtue of the dispute incident to the League of Nations.

Peace, Constitutionally and in Fact, Exists.

Under the Constitution, the President is charged with the enforcement of the law, and for a violation thereof is per-

sonally responsible to the person wronged. There is no sanctity attached to his actions, and, with deference, we submit that a fiction cannot be made to indefinitely postpone an admitted fact, wherein invidious personal privileges are projected and private property subordinated to personal prerogatives.

As to the existence of the war, it was classed in *United States v. Dry Goods Company*, 264 Fed., 218, "as passed into history, and is little more than a memory," and in *Hardware Co. v. Hoyle*, 263 Fed., 137, as a "fiction." This status was seen from the judicial branch.

From the executive branch we have proclamations without number setting forth as a fact that peace was with us, and therefor giving thanks.

From the legislative department we have a resolution passed wherein the peace status was defined.

In addition to these governmental declarations, we have it from a practical point of view that we are alone following the pursuits of peace, burdened withal by the obligations of war, whose temple may be closed by conduct just as effectually as by proclamation.

The Constitution expressly provides by whom war may be declared; it hedges about its declaration numerous restrictions, found requisite by the wisdom of the ages to protect a free people. *The Constitution fails to provide by whom peace is to be declared.* There is conferred the power to make a treaty upon the President and the Senate; there is conferred the right to pass laws upon the Congress, but when it comes to making peace, there is no exclusive method therefor by the Constitution provided. There is no prohibition against it being declared by the law of the land when it exists in fact. The Constitution is the supreme law of the land, and when under it rights are given, whose existence has been judicially ascertained, does not the Constitution impose the duty upon this court to declare that which is known to all men?

The Constitution is without restriction upon bringing into being the blessings of peace—the elimination of war by the restoration of law. As the keeper of the law, the non-delegable duty rests upon this court to recognize the operation of that instrusted by the Constitution, namely, to take judicial notice of the fact of the existence of war. Why not of peace?

We appreciate and have read and reread the decisions of this court with reference to the exercise of the co-ordinate constitutional powers by the President, the Congress, and this court; but, after such examination, we submit there never has been a time in the history of this Republic where all of our Allies are at peace, in theory and in fact; the enemy upon which war was declared has ceased to be; portions of its territory allocated to our Allies, and the commercial intercourse being had almost as if war had not been, and yet, a state of war, theoretically, is said to exist.

As pointed out by Halleck (*International Law,* 845), the power that is vested with the power to declare war is not necessarily the same power as is vested with the right to declare peace (citing several historical cases). So, while it may be that Congress can declare war, and the President bring it on in case of civil strife or invasion, it does not therefore follow that under the present judicially known conditions, with reference, not to foreign nations, but as to citizens of the United States, located in the city of Jackson, in reference to their private property, this court could not give effect to the Constitution.

Note the decision in *Prize Cases* (2 Black, 666), where war is defined, the course as to civil war pointed out, and it then declared:

> "As a civil war is never publicly proclaimed, *eo nomine,* against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and to know."

And further:

> "If a war be made by invasion of a foreign nation, the President is not only authorized, but bound, to resist force with force. * * * And, whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be 'unilateral.' Lord Stowell (*The Eliza Ann,* 1 Dod., 247) observes: 'It is not the less war on that account, for war may exist without declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only is not a mere challenge, to be accepted or refused at pleasure by the other.'"

Thus, as to the beginning of the war, it appears to be a question whereof this court can take judicial notice; and, if so, surely its duty to thereby preserve the Constitution is supreme.

As to the termination of a war, like circumstances may exist; but in *The Protector,* 12 Wall., 701, it was, among other things, said:

> "Acts of hostility by the insurgents occurred at periods so various and of such different degrees of importance and in parts of the country so remote from each other, both at the commencement and the close of the late civil war, that it would be difficult, if not impossible, to say on what precise day it began or terminated."

The court then makes reference to the two proclamations of the President, and concludes the opinion thus:

> "In the absence of more certain *criteria,* of equally general application, we must take the dates of these proclamations as ascertaining the commencement and close of the war in the States mentioned in them."

Thus showing that the matter was a fact to be determined, and we submit that those factors hereinbefore set forth show

that it has terminated. And, having terminated, there is no longer the power in the President to exercise legislative powers by projecting his will into law by failing to declare the obvious. Does not this law at this date derive its sole validity from a failure to declare what we all know? And, if so, is not this act in so failing to declare a condition, known of all men, the exercise of legislative power by the President contrary to the terms of the Constitution?

The duty to preserve the peace is stated strongly by Vattel (*Law of Nations*, 430), and the duty to recognize as existing is equally paramount.

We recognize the fact that some of the lower Federal courts have attributed to this court the duty blindly to follow the proclamation of the political department (*Hamilton v. McClaghty*, 136 Fed., 449; *United States v. 129 Packages*, 27 Fed. Cas., 289, and cases collected); but all of these had to do with external relations, political relations as such, and did not embrace the case where private property was being taken in the country where war had never been flagrant. This is not a political question; it is a property question, and, as such, the Constitution is binding upon all persons who may be depositories thereunder (*Telephone Co. v. Los Angeles, supra*). Note with what exactness the powers of war and pertaining thereto are circumscribed in Congress, and if the Constitution expressly left the right unvested, but did prohibit taking property without due process, would not this court follow that, which the court would have a right to determine and which was a condition precedent to the performance of the constitutionally imposed obligation?

In *Hall, International Law* (6th edition), 559, it is declared:

> "The termination of war by simple cessation of hostilities is extremely rare. Possibly the commonly cited case of the war between Sweden and Poland, which ceased in this manner in 1716, is the only unequivocal instance, though it is likely that if anything

had occurred to compel the setting up of distinct relations of some kind between Spain and her revolted colonies in America during the long period which elapsed between the establishment of their independence and their recognition of the mother country it would have been found that the existence of peace was tacitly assumed. No active hostilities appear to have been carried on later than the year 1825, and no effort

made to hold neutral States or individuals to the obligations imposed by a state of war; but it was not till 1840 that intercourse with any of the Central or South American republics, except Mexico, was authorized by the Spanish Government. In that year commercial vessels of the Republic of Ecuador were admitted by royal decree into the ports of the kingdom, and at various subsequent times like decrees were issued in favor of the remaining States. It was only, however, in 1844, three years after commercial relations had been established, that Chile, which was the earliest of the republics, except Mexico, to receive recognition, was formally acknowledged to be independent; and Venezuela, which was the last, was not recognized till 1850.

"The inconvenience of such a state of things is evident. When war dies insensibly out, the date of its termination is necessarily uncertain. During a considerable time the belligerent States and their subjects must be doubtful as to the light in which they are regarded by the other party to the war, and neutral States and individuals must be equally doubtful as to the extent of their rights and obligations. Nevertheless a time must come, sooner or later, at which it is clear that a state of peace has supervened upon that of war. When this had arrived, the effects of the informal establishment of peace are identical with those general effects consequent upon the existence of a state of peace."

In Halleck, *Int. Law and Laws of War*, 844, it is said:

"It has been laid down as an unquestionable proposition of international law, that there is a legal as well

as a moral necessity that, with the ceasing of the causes which justified the inception of the war, the war itself should cease. Vattel enforces the obligation to seek peace as the end of war, and argues that no matter how just the war may have been at the commencement, it must not be continued beyond its lawful object, which is to procure justice and safety, and the moment an equitable compromise can be procured, it should cease. The obligation to accept a peace sufficiently safe is also strenuously argued by Grotius. Other writers say that when, by use of the legal means of war, the invaded right has been obtained or secured, the injury redressed, or the threatened danger averted, the *abnormal* state of war *must* cease, and the *normal* state of peace *must* be re-established. Some, who advocate the general right of external intervention, deem it a most proper occasion to exercise that right when a war, though lawfully begun, is unlawfully continued beyond the just objects of its inception. There are three ways by which a war may be concluded and peace restored: 1st, by the unconditional submission of one belligerent to another; 2d, by a *de facto* cessation of hostilities and a *de facto* renewal of the relations of peace by both belligerents; and, 3d, by a formal treaty of peace."

Prior to the enactment of the Constitution, war had thus terminated; with this knowledge, the learned men who framed that instrument, after making the most minute provisions relative to the institution of war, the limitation of its powers, the amelioration of its horrors, failed to provide how peace might be concluded. This failure is extremely significant, and as a part of the duty of this court, there is the paramount obligation that no property be taken without due process of law. Now, with an actual state of peace existing, could Congress exercise the war power by reason of a state of war that had theretofore existed? The duty to recognize the normal is the paramount duty of the nation. We submit that the coming of peace was not provided for, because when it came its blessings permeated the entire nation, and no man-made proclamation was requisite of the highest gift of God.

The power to recognize peace is not specifically allocated under the Constitution. Being expressly not assigned, did this divest this court of the power to obey the supreme law of the land in virtue of that which is now a "fiction," a "memory"?

War has terminated in this manner under the law of nations, and is it competent for this court to continue to burden the property of the people with that which, if it existed, was only in virtue of the war power? Can this court fail to appreciate the transition from law to the lack of it—war?

When peace has thus come in a constitutional manner, the Constitution, as the supreme law, limits the power of Congress by facts, not by fictions; by what is, the present; not by what was, history.

But it may be said that there has been no proclamation by the President; that therefore law has not come into its own by the end of war. Not so; the war power ends with the war. Peace, actual peace, devitalizes any exercise of the war power.

With greatest deference, and having before us only the duty of supporting the Constitution, we submit to the court that technical as well as actual peace is at hand. We have carefully noted the disinclination of this court to decide other than judicial questions; how admirably this court has coordinated the several functions of the Federal Government by its strict adherence to its own well-appointed course.

But all that any one claims to keep the United States at war, and not at peace, is the League of Nations, embodied in the Treaty by the President in the exact form that it was his pleasure to have it there imbedded. Had there been no such league, then technical and actual peace would surely have been coincident. Can, therefore, technical war suspend actual peace in virtue of a disagreement over the League? Can the property of appellants be taken in virtue of an alleged technical war when there is no war?

We do not seek to discuss the propriety, *vel non*, of entering the League by the signing of the Treaty. We insist upon basing the law upon conformity to the Constitution, such being the paramount duty of both the President and the Senate. We are sure neither desires aught else.

But if it be that the execution of the treaty, as to the League, by disagreement is, under the Constitution, to be defeated, due to the peculiar status of the powers of the President and Senate, it would be the duty of this court to declare that, irrespective of the execution of the Treaty, as a matter of law, peace existed and that a state of war did not exist.

That this declaration should precede the signing, we insist, if it is clearly demonstrable that the failure so to do would violate property rights under the Constitution.

We affirm that actual peace exists, and that the only fact that separates the Senate and the President in said Treaty is the League of Nations.

The status of technical war, or actual peace, ranges about this one point: If that League should be unconstitutional and be so held by this court, we are certain that both President and Senate would acquiesce. We deny the right to project technical war into actual peace by those instrumentalities, both subordinate to the Constitution, when the question of difference is the validity of a provision, extraneous to the rights of appellants. In short, in virtue of the assertion of an unconstitutional power, can technical war be projected to take appellants' property without due process of law?

The sole reason technical war still endeavors to persist, and why peace, actually here, is not recognized by the President, is a difference *in obligations for the future*, not for the present, in the League of Nations; and as public acts of both declare and show peace, it, at least, is a fact. If it be found that the formation of such a League is beyond the power of the President without the Senate's concurrence, then, with deference, we submit that it is competent for this court to assert the Constitution as the supreme law of the land, and to

vouchsafe to the citizens the protection thereunder guaranteed, when their rights are unconstitutionally invaded.

It may be said that this request borders upon an assumption of political power by the court. This is incorrect, for when it becomes the duty of this court to protect private property against unconstitutional impairment, then the exercise of that function is judicial.

The history of the war and the controversy as to Article X of the League are all well known, and had there not been a League, there is no question but that peace would now exist in theory as well as in fact. The question is, how far the President, pursuing what we shall endeavor to show to be an unconstitutional prerogative, can impair the rights inherent in the States and in their citizens.

League of Nations Not Constitutionally Within Purview of Treaty-making Power.

By section 4, Article IV, of the Constitution it is declared that the United States shall guarantee to every State in this Union a republican form of government.

By the Ninth Amendment it is declared that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people; and by the Tenth Amendment it is declared that the powers not delegated to the United States nor prohibited by it to the States, are reserved to the States respectively or to the people. These provisions are in addition to the mandates hereinbefore discussed, and bring up the question whether under the power to declare war an alleged state of war can be, contrary to the admitted fact, continued to the detriment of those who are by the Constitution vouchsafed rights thereunder, by the attempt to make a treaty in conflict with the Constitution at one point.

It must be admitted that it was the duty of the Senate and the President to have, when war ceased, relinquished those

prerogatives cheerfully acquiesced in by the people for the general welfare, but which were not possessed, when all know that the exigencies wherefor they were given have now finally terminated.

The proposition we submit is that the duty is imposed upon this court to see that the rights vouchsafed under the Constitution are not denied by an impossibility, unconstitutionally created, and whereby rights given by the Constitution are taken away by the personal actions of those who are charged with the administration of the law.

Can those charged with the performance of a function indefinitely assume to project that function when the cause for the discharge of such function has terminated, especially when such claim is solely based upon an unconstitutional predicate?

The President and the Senate are agencies for conducting the war; but when war has ceased, they are not an agency for depriving the people of those rights which the Constitution says they possess.

The President has seen fit to insist upon the acceptance, almost literally, of the Versailles Treaty, wherein was integrated the League of Nations, constituting the United States, under Article X thereof, but an instrumentality for the further prosecution of the wars now raging, and for the further financing of those small dependencies magnified into governments by force other than their own initiative. The wisdom of remaining out of the League of Nations, or going into the League of Nations, is not the question which we desire to present. No official or officials can, contrary to the Constitution, project a condition, under which personal government is perpetuated, in virtue of a usurpation of a right not constitutionally possessed.

Under *Hamilton v. Distilleries*, 251 U. S., 146, we submit that the power was confined to the making of a treaty, not abrogating any of the constitutional duties, nor integrating obligations which were outside of the functions thereunder brought into being.

It has been claimed that Article X imposes only a moral obligation. But with the people of these United States a moral obligation resulted in the Civil War; a moral obligation resulted in the Spanish War; a moral obligation resulted in the World War, and the transition from a moral obligation to a legal duty is not hard when the authority of the United States in the premises is being denied. And the creation of the status, so transforming, is one of those functions which has been delegated to the League, and as to which the United States ceases to be an independent sovereign.

But it is said that Article X has no such efficacy; that it was not to add to the burdens to be borne, but merely to be an instrument under which Congress would continue to exercise its constitutional functions; that Congress would still have the right to declare war, and that, therefore, we would be perfectly safe in entering where the declaration must be made by our own constitutional agencies.

The partisans of the Treaty proclaim that under it no unconstitutional obligation as to waging war is made. The duties assumed under the League would, in the instances thereunder specified, make the declaration follow as a matter of course. But there is no need for a declaration of war by Congress. If the United States does those things therein provided, war may be begun against it by the party who is sought to be coerced; a declaration of war is not a prerequisite to end of the reign of law. (See *Prize Cases*, 2 Black, 667.) War may be brought upon this nation without Congress doing more than ceasing to act, if in virtue of the duties assumed under the League we were to furnish aid to a State who had the right to demand it thereunder.

With deference, such, we submit, is the meaning of the Treaty, and, more, such is the interpretation of those who, with him, framed it.

Look at Poland, which makes an unwarranted attack upon Russia, and, as said last week (written August 20) by Lloyd-George to Parliament, "In spite of warnings from both

England and France." He further declared that in the terms of peace the Petrograd government would be entitled to take these factors into consideration, but that the Allies would continue to urge Poland to accept the terms of Russia, "Always supposing the continued independence of Poland is recognized in those terms." He further set forth to Parliament that if Poland did not accept those terms, "Having regard to military position the Soviets are entitled to exact, she could not be supported." But who is to pass upon what terms Soviets are entitled to exact; their declarations are openly that treaties are made but to be violated for advantage. Here, therefore, with an enemy of this type, we would, as a minority nation, be called upon to say what terms should or should not be accepted. Suppose that we were, as a minority, overruled, and thereupon complied and supplied aid and comfort to Poland in virtue of the decision for us made by the League, where would the state of peace be? Where, under the Constitution of the United States, is there any authority in the President, or any one else, to sit in judgment to determine whether terms offered to an aggressor nation are fair and reasonable? What would be said of the United States if the Congress would not declare war, after participation in all of the deliberations?

Lloyd-George was a party to the building of this Treaty; he should know what it means; and he defined to war-weary England, in the face of the threatened strike by the workers, what obligations had been assumed. He did not limit them to mere promises, but insisted upon performance.

The Premier declares to Parliament that the covenant entered into by the nations in the Peace Treaty *"depends upon the nations signing that treaty banding themselves together to defend those of their members who cannot defend themselves,"* and that England and France then were *"morally bound to interest ourselves"* in the case of an ally *"in the event of its national existence being endangered."* But this held, he declared, *"if the emergency were to come, would*

be in supplies, transport, artillery, and co-operation by experienced Allied commanders." But if these were insufficient, what next? It is true that he declares against sending armies; but if it has gone so far as that, where would we stop. It takes two to start a fight, but likewise it takes two to end it. We have no power to compel, when war supersedes law, the winning adversary to withdraw when we are losing.

Another aspect:

There can be no delegation of a delegated power, and the integration of the League of Nations would result into a suspension of the functions constitutionally imposed by the creation of the United States Government. That a superstate would be created has been shown; but whether that superstate could be constitutionally created without an amendment to the Federal Constitution is a matter which, we submit, requires at this time a decision by this court.

If we should enter into the League of Nations, a mere treaty-making power would invest the Government with these well-stated additional duties:

> "A treaty does preserve solidarity; an understanding, association for a common object, alliance of independent factors, may preserve solidarity; but how can a nation, even under such an interpretation of its powers, enter into a covenant with other States of the world to create an entity with governmental powers, even with limitations, to rule over other States of the world without consenting to such partial rule being extended over itself? And whether or not this membership implies surrender of sovereignty, it certainly extends sovereignty over others, and by so much as the exercise of voting power inside the League affects the independence and solidarity of other nations.
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> "In short, the League of Nations in functioning must have before it the ideal of a democratized world consisting of democratized States, themselves independent, or it is at once at war with itself. Has it such an ideal imbedded in its covenant? If it has,

then must it not proceed to undo the bonds of all empires? If it has not such an ideal in its constitution, then must not its functioning respond to the will of a majority of the States of the world as they are now constituted and to the League powers they exert inside the League? And, if so, and empires predominate in such power, then must not imperialism become the League dream and not democracies? And in consequence will we not find the States of the world drifting into compacted powers little different from those old alliances resting on the 'balance of power?'

* * *

"Again, foreign relations, through treaty-making, were placed in one division of the Government with and by the consent and advice of another, the Executive and Senate. In entering into a league, extending the Government of the Republic over other governments, though in limited degree, there is no provision in the Constitution, and none proposed, by which commissioners (though elected by the people) can be empowered to represent the United States by voting in the League. Though through a treaty a league may be born, the treaty-making Executive and Senate cannot therefore and thereafter sit in the Council of the League and thus represent the people of the United States therein. Under our Constitution as it stands, the President or Executive can no more assume to sit in the League as a sovereign representative of the United States than he can assume to sit in the council chamber of a foreign republic or assume to recommend to a foreign nation what laws it shall make. Treaty-making as a means of establishing and participating in a league is dead with a league in existence, and the executive is as far from it as the citizen.

"More than this the extension of the governmental power to the extent of participating in world movements and voting on foreign relations (especially those in which our own nation is *not* involved) so removes representative government from its source in the people as to almost, if not quite, constitute a species of autocracy not directed by or responsible to the

> people themselves. The citizen who holds fast to the Constitution, who is a strict constructionist, who believes in limitations on governments and in consent of the governed, must answer for himself whether or not this whole process is wrong in inception and execution, and whether or not it is tantamount to sending the United States forth as a crusader for a dream, and by allowing it to sit in a Council of a League, armoring it with force to accomplish that dream, and to coerce, if not by military means, then by super-civil means, this dream-conception to dominion over others"—(*The Commercial and Financial Chronicle*, July 24, 1920, pages 330-331).

Wherefore this admitted assertion of the President is without, with deference, we submit, sanction of the Constitution, and he has, therefore, in virtue of an unconstitutional assumption of power, assumed to project personal rule incident to the exercise of a war power through a peace period. The creation of a personal domination, through a failure to conform to Federal constitutional limitations, calls for interposition upon the part of the keeper of the palladium of our liberties. Must not this court say, when peace is affirmed by one and denied by another upon a specific ground alone, whether that ground is constitutionally tenable? That the treaty-making power does not embrace the surrender of our individuality as a nation, the imposition upon us as a people of acting for those who have been recently endowed by superior force with national entities, who in virtue of such are forthwith proceeding to demonstrate their incapacity for self-government by attacking others. Can we thus be ruled by a personal superior when it is known of all men that the source of his power consists in a failure to subscribe to that to which he is bound to conform?

It may be that the peace with Germany affects very few citizens of the United States. The fraction of our commodities sent to that nation compared with our internal commerce is infinitesimal; and yet, in virtue of the infinitesimal busi-

ness that would move between Germany and the United States with peace officially declared, the President has assumed to retain the war prerogatives over our internal affairs in virtue of a power which, with deference, furnishes no such authority, and to subordinate our personal liberties to a gratification of a consummation to be attained by the creation of an unconstitutional status.

As a free people, we submit that we are entitled to appeal to this court to set forth the limitations which may be occupied by the President in the bringing of peace, so that we may not again be held up to the world as lacking in good faith because our Chief Executive overstepped his constitutional bounds.

The duty ordinarily not to interpose, we admit; but where, as in this instance, a failure so to protect private property committed irretrievably to the protection of this court would thus fail, we insist that the limitation upon the President's power should be declared and the impassibility thereby unconstitutionally established be constitutionally dissolved.

Wherefore we respectfully submit that the Lever Act should be declared unconstitutional, and, if constitutional when passed, it cannot now, in peace, be enforced, and that proper restraining orders should be issued. But, if declared constitutional, the decree should, nevertheless, be reversed and proper restraining orders granted to vouchsafe those fundamental rights which are being frittered away by the departmental edict of one unclothed with constitutional authority to do those things by him sought to be done.

Respectfully submitted,

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